

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC K. WHITE,

Defendant-Appellant.

UNPUBLISHED

June 18, 2002

No. 231996

Wayne Circuit Court

LC No. 00-003992

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for armed robbery, MCL 750.529, possession of a firearm during the commission of a felony, MCL 750.227b, and possession of a firearm by a felon, MCL 750.224f. Defendant was sentenced, as a second habitual offender, MCL 769.10, to ten to twenty years' imprisonment for the armed robbery conviction, two years' imprisonment for the felony-firearm conviction, and five years' imprisonment for the possession of a firearm by a felon conviction. We affirm.

Defendant first argues that all charges against him should be dismissed based on entrapment. We disagree. The trial court must make specific findings regarding entrapment and its findings are subject to appellate review under the clearly erroneous standard. *People v Juillet*, 439 Mich 34, 61; 475 NW2d 786 (1991); *People v Connolly*, 232 Mich App 425, 429; 591 NW2d 340 (1998).

The "intentional relinquishment or abandonment of a known right" constitutes waiver, while forfeiture is "the failure to timely assert a right." *People v Adams*, 245 Mich App 226, 240; 627 NW2d 623 (2001) (citations omitted). The waiver of a right extinguishes any error and precludes appellate review of the issue. *Id.*, citing *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). In this case, the trial court held an evidentiary hearing outside the presence of the jury on the entrapment issue raised by defendant. At the close of the testimony, defense counsel stated:

Your honor, I understand that entrapment is an affirmative defense. And, frankly, I don't think on this record that we have been able to establish that.

We conclude that defendant waived this issue because he withdrew his affirmative defense of entrapment, and as a result, the trial court never ruled on the issue. Thus, appellate review is

foreclosed because the waiver has extinguished any error. *Id.* Moreover, there is no support for defendant's entrapment theory, as there is no evidence on the record that the police induced defendant to commit any of the charged crimes. See *People v Milstead*, __ Mich App __; __ NW2d __ (Docket No. 224916, issued March 12, 2002), slip op, p 1.

Defendant next argues that, during the evidentiary hearing on defendant's entrapment claim, the trial court erred when it sustained the prosecutor's relevancy objection to defense counsel's question regarding the truthfulness and reliability of the confidential informant. The decision to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000).

Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). "Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point." *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Defendant maintains that the facts of this case should be likened to a search and seizure case, and analogizes that the detectives' use of a confidential informant must be based on information that is reliable or credible. Defendant cites several cases in his brief on appeal, but only in the context of searches and seizures. Defendant does not include any legal precedent for his argument that the search and seizure requirements are applicable in this case. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Nonetheless, we find that defendant has failed to show how the search and seizure requirements are "material" to this case, where there is no search warrant, no search, and where a confidential informant was only used to begin an undercover investigation of a suspect. *Aldrich, supra*. The confidential informant's reliability and truthfulness are not relevant to defendant's convictions for armed robbery, felony-firearm, and possession of a firearm by a felon. Thus, the evidence was not relevant and the trial court did not abuse its discretion when it sustained the prosecutor's objection on the grounds of relevancy. *Crawford, supra*.

Defendant next claims that he was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, because of such representation, he was prejudiced to the extent that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, a defendant must show that, but for trial counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Id.* at 687.

Defendant argues that defense counsel did not effectively argue the affirmative defense of entrapment and did not move for a “*Franks*¹-style” hearing to determine the reliability of the confidential informant. “Trial counsel is not required to advocate a meritless position.” *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). These defenses are not relevant to the charged offenses in this case. Accordingly, defendant was not denied the effective assistance of counsel.

Defendant also argues that defense counsel did not effectively cross-examine the prosecution’s witnesses, and raised issues regarding the number of times defense counsel contacted him, what witnesses he interviewed, and what evidence he reviewed. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Furthermore, “[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Failure to call witnesses or present evidence constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Based on the existing record, defendant cannot overcome the strong presumption that counsel’s actions constituted sound trial strategy. *Stanaway, supra* at 687. Furthermore, defendant cannot demonstrate prejudice such that the outcome of his trial would have been different were it not for counsel’s errors. *Id.* at 687-688. This is due to the overwhelming evidence that defendant committed the crime. The police testimony showed that defendant was the subject of an undercover narcotics investigation. During a meeting for a supposed drug sale, defendant entered the undercover vehicle of Detective Joseph Jakubus, threw a crumpled brown paper bag containing rocks at Jakubus’ feet, pointed a gun at Jakubus, and demanded \$2,700. When asked why he pulled his gun on Jakubus, defendant stated, “to take his money.” He also admitted that there was “no excuse” for his actions, except that he was trying to feed himself and his three children. Hence, defendant was not prejudiced to the extent he was denied a fair trial. *Pickens, supra*.

Last, defendant argues that the trial court erred when it did not give defendant and his family an adequate opportunity to retain a replacement attorney. We disagree. We review a trial court’s decision whether to grant a continuance for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999).

On the day of the trial, defendant asked the court for a continuance. Defense counsel explained to the court that defendant wanted more time so he could seek new counsel because, apparently, his family had secured funds to retain counsel. Defendant’s mother told defense counsel that she was “not in a position to give . . . information” about the identity of the new attorney. The trial court stated that it had adjourned the case once because defendant needed more time for discovery. It adjourned the case a second time, at defendant’s request, because he wanted a new attorney. The court appointed defendant new counsel at that time. On the date set for trial, the court considered defendant’s latest request for a continuance and denied it. The

¹ *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

court stated that defendant's appointed counsel was "an extremely good attorney" and would represent defendant well.

When reviewing a trial court's decision to deny a defendant's motion for a continuance to obtain another attorney, we consider the following factors:

(1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*Id.* at 369.]

Application of the foregoing factors to the instant case reveals that the trial court did not err in denying defendant's request to obtain a new attorney. Although defendant was asserting his constitutional right to counsel, there appears to be no legitimate reason for defendant to assert the right. The record does not indicate that a dispute existed between defendant and his appointed counsel at that time, but only that defendant's family may have secured funding to retain an attorney. Furthermore, because defendant waited until the first day of trial to assert his right, he was negligent. Moreover, in light of the trial court's discussion of the two prior adjournments in the case, together with already replacing defendant's attorney once, and the fact that defendant's mother could not provide the court with any information regarding the identity of the new attorney, it appears that the trial court considered defendant's motion for a continuance to find new counsel a delay tactic. Thus, we find that the trial court did not abuse its discretion in failing to grant defendant's motion for a continuance. *Id.*

Affirmed.

/s/ Kirsten F. Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray